SERVED: March 24, 1992

NTSB Order No. EA-3518

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 9th day Of March, 1992

BARRY LAMBERT HARRIS,
Acting Administrator;
Federal Aviation
Administration,

Complainant, Docket SE-10181

v.

JOHN F. LEADER,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, rendered at the conclusion of an evidentiary hearing on October 5, 1989.[1] The law judge affirmed the Administrator's allegations that respondent violated sections 61.3(c), 91.65(a), and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part

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[1] An excerpt from the hearing transcript containing the initial decision is attached.

91).[2] The Administrator maintained that respondent, while executing a landing, engaged in dangerous behavior by operating an aircraft within 50 feet of another aircraft and landing on a runway already occupied by that same aircraft.[3] The order called for the suspension of respondent's airman certificate for 180 days. Although the law judge affirmed the Administrator's order as to the three FAR violations, she reduced the period of suspension to 140 days.[4]

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[2]These sections read in pertinent part:

"§ 61.3 Requirement for certificates, rating, and authorizations.

(c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter. . . ."

"§ 91.65 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The Administrator also charged that respondent's medical certificate was not current. It was, in fact, 110 days out of date. Respondent conceded that his certificate had expired, and does not appeal the law judge's imposition of a 20-day suspension for that violation.

[4]The law judge broke down the suspension period to 20 days for the section 61.3(c) violation, and 60 days each for the violations of sections 91.65(a) and 91.9. The Administrator did not appeal the suspension reduction.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified in the law judge's initial decision.

The incidents at issue occurred on September 18, 1988, in the vicinity of Dillant-Hopkins Airport, Keene, New Hampshire (an uncontrolled airport). Respondent admits that he was pilot in command of a Mooney M-20K aircraft (the "Mooney") , civil registration N231KF, on a flight from Plum Island, Massachusetts to Dillant-Hopkins Airport. At the same time, a student pilot accompanied by a flight instructor was practicing touch-and-go landings at the airport in a Piper Colt aircraft (the "Piper").

The flight instructor testified that, after completing several touch and goes, he and the student were executing a final pattern before landing, when they heard a Precision aircraft announce that it was about six miles south of the airport on a straight-in approach to land. The student further stated that, as they turned onto the downwind leg of the flight pattern, he saw a Mooney fly at them at an angle from behind. The instructor observed that the Mooney was flying at about the same altitude as the Piper and traveling at high speed when it dipped approximately 50 feet underneath the Colt. By contrast, respondent claims that he did not see the Piper as he entered the traffic pattern. He asserts that

he was already in the traffic pattern when he noticed the Piper come from behind him to his left and overtake him. He further maintains that after he took evasive action, the Piper executed a teardrop curve and landed.

It is undisputed that the Piper landed and then proceeded down the right-hand side of the runway toward a taxiway turnoff. Before it could effect the turn, the Mooney touched down on the same runway, which was about 150 feet wide. The flight instructor testified that he saw the Mooney roll by " at a very close distance," going about 40 to 45 miles per hour. Respondent claims that he attempted to ascertain the Piper's intentions via radio communications, but received no reply. Since he did not know whether the Piper was going to land or execute a touch and go, he decided that the safest course of action was to land.

On appeal, respondent contends that the law judge's findings of fact were incompatible with the evidence presented and thus do not support the alleged violations. We find this argument unpersuasive. The flight instructor and the student pilot both testified that, before landing, they saw the Mooney as it emerged from underneath their aircraft. They also confirmed that this was the same aircraft that passed them on the runway. Another of the Administrator's witnesses corroborated this account of the incident. Furthermore, respondent admitted that he landed while the Piper was still on the runway. The law judge evaluated the

evidence, assessed the credibility of the witnesses, and determined that the Administrator proved the violations by a preponderance of the evidence. We see no reason to disturb her decisions.[5]

Respondent also asserts that the law judge's conclusion that he intentionally tried to force his way into the landing pattern out of turn is not supported by the evidence. We disagree. The law judge was in the best position to assess the credibility of the witnesses as they testified. We cannot conclude, as respondent seems to suggest, that simply because the law judge did not espouse respondent's version of the facts, she has erred. See Administrator v. King, NTSB Order No. EA-3459 (1991); Administrator v. Klock, NTSB Order No. EA-3045 (1989). In any event, a finding of intent is not necessary to conclude that violations of FAR sections 91.65(a) and 91.9 occurred.[6] Respondent further asserts

[5]Respondent also argues that the testimony given by the Administrator's Witnesses was conclusory, since no direct evidence was presented to show that his landing created a collision hazard. An FAA inspector and the flight instructor testified, however, regarding safe and proper conduct in an airport traffic pattern and the inadvisability of landing on an occupied runway. The inspector also stated that, in his opinion, respondent's actions were careless and reckless. Consequently, we believe that ample evidence was presented to support the law judge's conclusions.

[6]Regarding sanctions, we have stated: "[T]he Board, as a general matter, has not accepted as a valid rationale for reducing or eliminating sanction certain factors [such as] the inadvertent nature of the violation. . .." Administrator v. Martens, 3 NTSB 2652, 2653 (1980), quoted in Administrator v. Tuomela, 4 NTSB 1422, 1424 (1984).

that the "record is replete with inappropriate references to [his] 'attitude.'" Respondent's brief at 11. We disagree. The law judge did not place undue emphasis on respondent's attitude. Rather, she stated that it could only be considered when determining sanction. Inherent in a law judge's legitimate credibility assessments is an evaluation of "attitude" and witness demeanor.

Respondent next argues that even if violations of sections 91.65(a) and 91.9 occurred, the sanctions imposed were excessive. He claims that a 91.9 violation should be considered only a residual violation, not warranting an additional penalty.[7] Precedent belies his assertions.

Previously, we have explained that "[i]n assessing sanction, it is our role to determine whether the period of suspension is commensurate with the circumstances of the case and with precedent in order to deter respondent and other pilots from committing like violations in the future." Administrator v. Tuomela, 4 NTSB 1422, 1424 (1984). For violations of sections 91.65 and 91.9, we have upheld the

[7]Respondent maintains that the law judge improperly imposed an additional penalty for the 91.9 violation when she should have considered it a residual violation. The law judge that the 91.65(a) violation warranted a 60-day suspension and the 91.9 violation warranted an additional 60-day suspension. It is our opinion, however, based on the record and the factual summary contained in the initial decision, that the law judge meant to impose one 60-day suspension for the incident above the runway, and another 60-day suspension for the incident on the runway. The total suspension of period 120 days is consistent with Board precedent for similar infractions; therefore, we shall affirm the law judge's decision.

imposition of similar sanctions in the past.[8] The sanctions imposed by the law judge in the instant case were consistent with precedent.[9]

Based on the foregoing, we adopt the law judge's

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[8]See e.g. Administrator v. Turner, 5 NTSB 1835 (1987) (respondent took off shortly after another aircraft had landed on same runway and flew closely over it) , 120-day suspension, FAR §§ 91.65(a) and 91.9 violations; Administrator v. Lankford, 5 NTSB 1829 (1987)(respondent flew within 200 feet of another aircraft, acting contrary to ATC instructions) 45-day suspension, §§ 91.65(a), 91.67(a), 91.75(b) and 91.9 violations; Administrator v. Thompson, 5 NTSB 1376 (1986) (respondent flew too closely in formation flight -- propeller sliced other aircraft causing it to crash) 8 months suspension, §§ 91.65(a) and 91.9 violations; Administrator v. Mannix, 4 NTSB 1193 (1984) (respondent taxied onto runway when other aircraft was making final approach) 90 days suspension, §§ 91.65(a), 91.67(a), and 91.9 violations; Administrator v. Schwarzer, 3 NTSB 2004 (1979), (respondent flew closely to another aircraft while overtaking it, then turned across its flight path) 100 days suspension, §§ 91.65(a), 91.9, and 91.67(a) violations. See also Administrator v. Cox, 5 NTSB 430 (1985) , 180 days suspension, §§ 91.79, 91.65(a), 91.87(a)&(b), and 91.9 violations; Administrator v. Fincher, 4 NTSB 1003 (1983), 75 days suspension, §§ 91.75(a), 91.65(a), and 91.9 violations.

[9]In Administrator v. Lipscomb, 4 NTSB 330 (1982), respondent violated FAR sections 91.65(a)&(b) and 91.9 by operating his aircraft in formation flight within 100 feet of another aircraft without prior arrangement with the pilot in command of that aircraft. Respondent's airman certificate was suspended for 30 days. We explained:

> "The Board has, on a number of prior occasions? decided cases involving essentially the same regulatory violations as those established in the instant proceeding. Although the facts and circumstances surrounding each case vary and all cases must, in the final analysis, be decided upon their own merits, such prior decisions provide reasonable guidance for assessing sanction herein.
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> Since 1973, the sanctions imposed by the Board for violation of FAR sections 91.65 and 91.9 have ranged from a 30 day suspension to revocation."

Id. at 331 (footnotes omitted).

decision as our own.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order is affirmed, as modified by the initial decision; and
3. The 140-day suspension of respondent's airman certificate shall begin 30 days after service of this order.[10]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT , Members of the Board, concurred in the above opinion and order.

[10]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).